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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 4

In re D.R., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.R., Defendant and Appellant.	A125685 (Del Norte County Super. Ct. No. JDSQ086030)

Defendant D.R. appeals from an order of continued wardship[1] (Welf. & Inst. Code, § 602) upon a finding that he committed several offenses, including a violation of Del Norte County Municipal Code section 9.42.020 (section 9.42.020). Also known as the Juvenile Preclusion Act, section 9.42.020 makes it a misdemeanor for a minor to have a blood alcohol level (BAL) equal to or greater than .01 percent while in any public place within Del Norte County. D.R. contends that there is insufficient evidence to support the juvenile court's finding that he violated section 9.42.020. We disagree and affirm.

I. FACTS

At approximately 7:45 p.m. on June 8, 2009, Department of Fish and Game warden Nick Buckler spotted 17-year-old D.R. fishing on a rowboat out in the ocean near

[1] D.R. was previously declared a ward of the court and was on probation for an unrelated matter at the time of this incident.

Pebble Beach Drive in Crescent City. Buckler recognized and was familiar with D.R. as he had had previous encounters with him. With the use of binoculars and a spotting scope, Buckler observed D.R. catch rockfish with more than one fishing rod, smoke cigarettes, discard cigarette butts into the ocean, and drink from a tall silver can. Interested in talking to D.R. and inspecting his catch, Buckler waited for D.R. to come ashore. When D.R. was five or ten feet from shore, Buckler stepped out of a hiding spot, identified himself to D.R., and notified D.R. that he needed to inspect his fish. D.R. rowed away. Buckler then continued to follow D.R. in his vehicle by driving on a parallel road. He then waited for D.R. to make his way to shore again. A short while later, Buckler made contact with D.R. and inspected his fishing license and catch. Buckler immediately detected the smell of alcohol on D.R. Buckler characterized this smell as a distinct odor which became detectable to him every time he got within a few feet of D.R. D.R. was in possession of one too many fish, in violation of a law limiting the number of rockfish that one is allowed to catch and possess.

When Buckler inspected D.R's rowboat, he found some fireworks and an empty 24-ounce can of Steel Reserve beer. Buckler then asked D.R. how many beers he had to drink that day and D.R. denied having drunk any beer. Buckler did not administer a preliminary alcohol screening (PAS) test to determine D.R's BAL because he did not have a testing kit with him and did not have time to summon someone to administer the test.

R.R., D.R.'s father, testified that he watched D.R. while he was fishing and did not see him smoking or drinking. In response to a question from defense counsel as to whether D.R. had ever had any trouble with "doing drunks," R.R. acknowledged that D.R. has "drank a little alcohol." R.R. also testified that on the day of the incident, D.R.'s brother had been on the boat with D.R. but had to get out of the boat because "he got too drunk."

A petition (Welf. & Inst. Code, §§ 602, 777) was filed on June 24, 2009, alleging that D.R. violated his probation by committing the following eight offenses: using more than one fishing line (Fish & G. Code, § 28.65, subd. (c)), possessing more than

10 rockfish (*id.*, § 28.55, subd. (b)), depositing refuse in state waters (*id.*, § 5652, subd. (a)), possessing dangerous fireworks without a permit (Health & Saf. Code, § 12677), resisting a peace officer on two separate occasions (Pen. Code, § 148), having a BAL equal to or greater than .01 while in a public place (Del Norte County Mun. Code, § 9.42.020), and possessing tobacco (Pen. Code, § 308, subd. (b)). After a contested hearing, the juvenile court sustained all eight charges.

II. DISCUSSION

D.R. contends that there was insufficient evidence to support the juvenile court's finding that he had a BAL of .01 or greater in violation of section 9.42.020. We review the court's finding under the substantial evidence standard. (*People v. Reilly* (1970) 3 Cal.3d 421, 425 (*Reilly*).) Under this standard, we review the whole record "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) If the circumstances reasonably justify the trier of fact's finding, reversal of the judgment is not warranted despite the existence of circumstances which might also be reasonably reconciled with a contrary finding. (*Reilly*, *supra*, 3 Cal.3d at p. 425.) Reversal is only appropriate where it "clearly appear[s] that upon no hypothesis whatever is there sufficient substantial evidence to support [the judgment]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Section 9.42.020 provides that "[i]t is unlawful for any person under twenty-one years of age to have a [BAL] equal to or greater than 0.01 percent while in any public place within Del Norte County." Although there was no direct evidence that D.R. had the requisite BAL of .01 or greater since no PAS test was administered, the juvenile court sustained the charge based on the circumstantial evidence presented. The court stated: "As to Count VII, the violation of the Juvenile Preclusion Act, it does appear that the warden did smell alcohol on the minor's breath and that there was at least one beer can there that apparently had been consumed, and it does appear to me that although we don't

have a specific [BAL], that, nonetheless, consuming one or more beers would result in that [BAL] and therefore I do find Count VII to be sustained."

D.R. argues that the use of circumstantial evidence to establish a certain BAL does not suffice to uphold a violation of section 9.42.020. Relying on *Baker v. Gourley* (2002) 98 Cal.App.4th 1263 (*Baker*), D.R. asserts that circumstantial evidence of drinking or drunkenness without a valid chemical test establishing a specific BAL is not sufficient evidence to support a violation of the law. D.R. misreads the holding in *Baker*.

In *Baker*, the plaintiff's driver's license was suspended by the Department of Motor Vehicles (DMV) upon his arrest for drunk driving. At the license suspension hearing before the DMV, the plaintiff introduced uncontroverted evidence demonstrating that the blood test procedures used to prove that he had a BAL of .08 or greater at the time of his arrest were defective. When the DMV refused to reinstate Baker's license, he sought relief in the trial court. The trial court upheld the suspension based on the circumstantial evidence that plaintiff exhibited "an unsteady gait, bloodshot eyes, slurred speech, a smell of alcohol, and . . . a port wine stain on his clothing." (*Baker*, *supra*, 98 Cal.App.4th at p. 1265.) On appeal, the court reversed and held that the use of circumstantial evidence to establish the plaintiff had a BAL of .08 or greater was insufficient to support suspension of a driver's license. The court noted that the plaintiff's license was suspended under an Admin Per Se law (Veh. Code, § 13353.2) that "focused *entirely* on blood-alcohol level." (*Baker*, at pp. 1264, 1273.) "Because the Admin Per Se law is wholly pegged to a given [BAL], it follows that circumstantial evidence *without* a valid chemical test is insufficient to suspend a license. After all, the usual symptoms of substantive intoxication—slurred speech, bloodshot eyes, etcetera—can manifest themselves at a [BAL] *below* .08. [Citation.]" (*Ibid.*)

The *Baker* court, however, made clear that its holding did not apply to a criminal prosecution for drunk driving. It recognized that "a jury in a court of law could conclude in a criminal prosecution that a driver was intoxicated based on such indicia as slurred speech and an unsteady gait without a valid chemical test." (*Baker*, *supra*, 98 Cal.App.4th at p. 1264.) Thus, the *Baker* court acknowledged that circumstantial

evidence, apart from a BAL test, could be sufficient to support a conviction for driving under the influence. Other courts have acknowledged that circumstantial evidence can be used to uphold a driving while intoxicated conviction. (See, e.g., *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 266 & fn. 10 [parties may adduce circumstantial evidence other than BAL test to establish requisite BAL to prove or disprove drunk driving]); *People v. Warlick* (2008) 162 Cal.App.4th Supp. 1, 7 [expert testimony on retrograde extrapolation used as circumstantial evidence to show BAL was higher at time of driving].)

Here, Buckler testified that he observed D.R. drink from a tall silver can while D.R. was on the boat and that he immediately smelled alcohol on D.R. when he spoke with him: "From the moment he came ashore and I was able to physically contact him, I could smell alcoholic beverage coming from his person, and each time I would get within a few feet of him I could smell a very distinct odor." Additionally, the only container Buckler found in the defendant's boat was an empty 24-ounce silver beer can. While D.R. denied that he had been drinking, the circumstantial evidence of Buckler's observation of D.R. drinking from a silver can together with the empty beer can and odors of alcohol emanating from D.R. during his contacts with Buckler was sufficient to support the court's finding that D.R. had a BAL equal to or greater than .01.

D.R. argues that the direct evidence demonstrates he was not drinking alcohol. He relies on testimony of his father and of a friend, J.M., who were near the scene at the time of the incident and denied seeing D.R. drinking. The credibility of the witnesses was for the court to determine; we will not reweigh the evidence on appeal. (*People v. Carr* (1959) 170 Cal.App.2d 181, 183.)

III. DISPOSITION

The order is affirmed.

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RIVERA, J.

We concur:

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REARDON, Acting P.J.

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SEPULVEDA, J.